No. 15143

In the United States Court of Appeals
for the Ninth Court

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

OLAA SUGAR COMPANY, LTD. AND ILWU LOCAL 142
RESPONDENTS

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

# ANSWERING BRIEF FOR RESPONDENT ILWU LOCAL 142

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# Answering Brief for Respondent ILWU Local 142

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## JURISDICTION

Respondent union concurs in petitioner's statement of Jurisdiction (Petr. Br. 1) but submits this in turn depends on the question of whether or not Banez, the charging employee herein, is an agricultural laborer under Section 2 (3) of the National Labor Relations Act, as amended.

## STATEMENT OF THE CASE

Respondent union generally concurs in petitioner's statement of the case (Petr. Br. 2-13) as a substantially accurate summarization of the same, except as respondent notes to the contrary hereinafter.

SUMMARY OF ARGUMENT

I. The collective bargaining agreement neither on its face nor as applied was illegal or discriminatory. The evidence on the record as a whole fails to substantially show that respondent union unlawfully caused the discharge of Banez.

II. Banez was exempt as an agricultural laborer under Section 2 (3) of the National Labor Relations Act, as amended. He was such under both Section 3 (f) of the Fair Labor Standards Act as made applicable to the National Labor Relations Act through the Board Appropriation Acts and under controlling Board decisions.

ARGUMENT

## A. The Unfair Labor Practices.

### 1. *Section 1, Paragraph 8 of the Collective Bargaining Agreement.*

Petitioner sets out the language of Section 1, Paragraph 8 of the contract on page 7 of its Brief. The contention is that this language is discriminatory *per se* (Petr. Br. 15-16). The section says that any *claim* of the Union that a non-union employee is disrupting harmonious working relations *may* be taken up as a grievance; repeated disruption of this sort shall be *grounds* for discipline or discharge. Respondent union submits this amounts to no more than the right to present a grievance in the hope of correcting and ameliorating a disruptive situation—should the Company feel the claim to be justifiable. In the case of repeated disruptive practices, the conduct (or misconduct) is grounds for discipline or discharge—if and only if the Company deems such action warranted. In short a dis-

cretion is lodged in the Company to reject the claim in its entirety or, if it feels some action is justified, to "discipline" (which may take the form of anything from a reprimand to action short of discharge) or discharge the employee. Consequently it is difficult to see how the Company is *required* to take disciplinary action, willy nilly. (See Petr. Br. 15-16). It is submitted petitioner has misconstrued the contract section in this regard, and that it is not discriminatory *per se*.

2. *Discharge of Banez.*

Petitioner contends the discharge of Banez was brought about because of his want of union membership and his exercise of rights under the Act, rather than for activities unprotected by the Act (Petr. Br. 17-24).

To understand the setting and background against which events leading to the discharge were staged it is necessary to view the plantation's plan to convert from hand to mechanical cutting of cane, which involved a layoff of about 50% of the plantation's employees. (R. 235). The largest group to be affected was the field work force, 75% of whom were Filipinos. Petitioner sets out the situation in its Brief, correctly indicating that the controversy, or potential controversy, was the feeling on the part of some that in retention of employment the Japanese were being favored over the Filipinos on racial rather than legitimate grounds; and the Union contended that in this situation Banez was active in fanning the flames of racial animosity. (See Petr. Br. 7-11)

A union entering into a collective bargaining agreement with an employer assumes certain obligations and duties, not only to the employer, but also to the employees and

union membership. Disruption of harmonious working relations on the job is a matter of concern to the union, as it is to the employer, and the responsibility for terminating such disruption is as much the union's as it is the employer's . It need hardly be said that disruption of the type here attributed to Banez, if it involved not the merits or non-merits of union activity but the stirring up of racial antagonisms, against the background of a threatened wildcat strike in violation of the contract (See Section 15 of the contract, General Counsel's Exhibit 14), is not protected activity under the Act, nor is the prevention of such disruption an unfair labor practice.

Respondent union submits that neither as written nor as applied did the contract clause in question violate the Act and that on the entire record the Board should have found the discharge legal and non-discriminatory. See, for instance, *NLRB v. Edinburg Citrus Ass'n.,* 147 F.2d 353 (C.A. 5) were racial antipathies and bad feeling between two employees and the rest of the employees leading to disturbance and violence justified the discharges despite a strong background in that case of union activity.

Misconduct that interferes with the job, with production, and with harmonious employee relations is proper cause for discharge. In the instant case this was present and there was no question of any attempt by the Union to procure the discharge of Banez under an invalid union-security clause—the usual situation.

### B. Banez Is Exempt As An Agricultural Laborer

#### 1. *The Issue Involved*

Petitioner refers to Section 2(3) of the Act which

exempts from coverage "any individual employed as an agricultural laborer" and to the Board's annual appropriation riders relating the definition of agricultural laborers to agriculture as defined in Section 3 (f) of the Fair Labor Standards Act; and petitioner states the issue here is whether Banez was within the exemption provided by that Act. The "two branches" of the definition are then referred to and petitioner attempts to demonstrate that Banez' work falls within neither. (Petr. Br. 24-25)

2. *The "Two Branches" of Section 3(f)*

The "first branch" is referred to in *Farmers Reservoir & Irrigation Co. v McComb,* 337 U.S. 755 at 762 as follows: "First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying etc., are listed as being included in this primary meaning." It need hardly be added that "harvesting" is one of the specifications included in this primary meaning. One question then is whether Banez, a truck driver hauling freshly cut cane from the field to the mill participates in "harvesting."

As to the "second branch" the *Farmers Reservoir* case, *supra,* 337 U.S. at 762, 763, states: "Second, there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with 'such' farming operations." The Supreme Court then goes on to say, with respect to the case then before it: "Dealing with these two branches of the definition it is clear, first, that the occupation in which the petitioner's employees are engaged is not farming. The

company owns no farms and raises no crops."

In *Maneja v. Waialua Agricultural Co.,* 349 U.S. 254, the Court, in dealing with the exemption as defined in Section 3 (f) of the FLSA stated at 260 that the exemption was meant to embrace the whole field of agriculture, and sponsors of the legislation so stated. In reference to the railroad workers who performed in that case substantially the same functions as the cane truck drivers in this case the Court said, at 260:

> Waialua's railroad workers not only haul cane from the fields to the processing plant but also transport farming implements and field laborers on the narrow-gauge railway extending throughout the plantation. For numerous reasons, we feel that these employees fall within the comprehensive wording of the agriculture exemption. Nowhere in the Act was any attempt made to draw a distinction between large and small farms or between mechanized and nonmechanized agriculture. In fact, the very opposite appears, since Congress in 1949 specifically refused to draw a distinction between large and small farms similar to the distinctions drawn in the size of newspapers or telephone companies. See HR Rep No. 267, 81st Cong, 1st Sess, p. 24, Compare FLSA, as amended, §§ 13 (a) (8), 13 (a) (11), 13 (a) (15).
>
> In view of this, we cannot hold that merely because Waialua uses a method ordinarily not associated with agriculture—a railroad—to transport the cane from the fields to the mill, it has forfeited its agriculture exemption. Where a farmer thus uses extraordinary methods, we must look to the function performed. Certainly no one would argue that the agriculture exemption did not apply to farm laborers who took the cane to

> the plant in wheelbarrows. There is no reason to construe the FLSA so as to discourage modernization in performing this same function.
>
> Furthermore, had Waialua not owned a mill, its transportation activities from field to mill would come squarely within the agriculture exemptions covering "delivery to storage or to market or to carriers for transportation to market." We do not believe the Congress intended to deprive farmers having their own mills of the exemption it afforded farmers who do not. In the debate on the amendment extending exemption to "delivery to market," its sponsor made clear that auxiliary activity of the kind here involved would be included within that term. 81 Cong Rec 7888.

The Court found the cases of *Bowie v. Gonzalez,* 117 F.2d 11 (C.A. 1), and *Calaf v. Gonzalez,* 127 F.2d 934 (C.A. 1), inapposite, going on to say that Waialua's transportation system was all either in or contiguous to its fields, save the mill trackage. It then stated:

> . . . The railroad is used exclusively for the effectuation of the agricultural function of transporting exempt agricultural workers to the fields, together with their equipment and supplies, and hauling freshly cut cane to the processing plant. Without it or some other "haul," the land could not be cultivated and the cane, after harvest, would spoil in the fields and be lost. We believe that under the facts here presented the administrative practice also requires that the railroad employees be classified as within the agriculture exemption.

It is submitted that the fact that workers and their equipment were hauled to the fields in that case and not in this

is immaterial.

In *Waialua* it must be remembered that there were two classes of "transportation" workers. The first operated the railroad cars on the portable tracks in, over and near the fields, taking the freshly cut cane to the company's main-line railroad, which ran throughout the plantation. From there skilled railroad workers transported the cane to the mill. It is apparent that it was this latter group which the Supreme Court was discussing in its opinion. See *Maneja v. Waialua Agricultural Co.,* 349 U.S. 254 at 257 and the same case below, *Waialua Agricultural Co. v. Maneja,* 216 F.2d 466 (C.A. 9) at 471. In the instant case it is apparent that the same operation has been to an extent merged, so to speak, as far as the cane trucks are concerned. These latter are loaded in the private field roads and then proceed along the same, within the confines of the fields either directly to the mill, or then onto private roads to the mill, or then onto public roads to the mill. (R. 161-168, 180-186). In view of the statement in *Waialua, supra,* 349 U.S. at 257, that freshly cut cane is extremely perishable and must be processed within a few days of harvesting or serious spoilage will result, and in view of the evidence in the record on this score in the instant case, it can properly be said that the truck drivers who receive the cane at the fieldside and then take it as expeditiously as possible to the mill are participants in the "harvesting" operation.

In *Holtville Alfalfa Mills v. Wyatt,* 230 F.2d 398 (C.A. 9), this Court had under consideration an FLSA case involving the agricultural exemption and stated the facts, at page 400, as follows:

> . . . The office, plant and equipment of defendant are located somewhat more than a mile beyond the city

limits of Holtville, California, and not on a farm. Defendant owns no farms and operates none. It purchases from farmers growing crops of alfalfa within a radius of one-half to eighteen miles of its plant. Defendant at the proper stage harvests the crop upon the various farms through its employees, including plaintiffs, by an integral operation wherein the alfalfa is mowed, raked into windrows, picked up and chopped and loaded into a truck for immediate transportation to the mills. There it is processed and placed on the market.

And at page 402 the Court said:

> There cannot be much doubt but that this entire process is harvesting. The trial court did not expressly so find, however, but did find the employees engaged in the process were employed in agriculture, which is, of course, sufficient. There can be no distinction drawn between a harvesting operation and an activity incident thereto, since Congress, as above noted, included both in the broad definition of "agriculture." The failure of the trial court to specify under which branch of the definition the harvesting activities here fall is without importance. The Briefs which attempt to make a point of this failure emphasize a distinction without a difference.
>
> Some difficulty arises with regard to the truck drivers inasmuch as they are employed in the integrated harvesting operation which has been above described. The trial court said with reference to them:
>
> "The work of these employees, while on the alfalfa fields, has been described. Upon arrival at the mill with a full load, the drivers back up their truck to a self-feeder or leave it in the yard for others to handle.

> They then drive their trucks back to the fields as soon as empty vehicles are available."
>
> It is obvious that the truck driver does not do any handling of the product at the mill, but simply returns to the field with another truck.

The Court then stated that the theory upon which the lower court held the truck drivers were not engaged in agriculture was not entirely clear; that express findings should be made as to spoilage of the newly cut alfalfa that might render it not an agricultural product in its raw or natural state. The Court then went on to state, at 403:

> Transportation of crops so that spoilage can be prevented is usually considered part of harvesting. The operation was one which was integrated with the harvesting and occurred "on a farm." Part of the journey to the mill took place off the farm, and of course, was not performed by a farmer. It must be remembered, however, that the statute includes as agriculture "preparation for market, delivery to storage or to market or to carriers for transportation to market." 29 U.S.C.A. § 203.

The case was remanded for further findings and judgment thereon.

From the foregoing it would appear the cane truck drivers in the instant case were engaged in harvesting operations or, at the very least, in an activity incident thereto.

Petitioner cites *Chapman v. Durkin,* 214 F.2d 360 (C.A. 5), cert. den. 348 U.S. 897, in support of the proposition that transportation of crops from field to mill is not exempt at all, or if exempt is such pursuant to the "second branch,"

that is, if performed by a farmer or on a farm. The *Chapman* case is interesting because the employer there was neither a farmer nor a producer in agriculture. His business was colloquially known as a "bird dog" operation, that is, he purchased fruit unfit for packing and sale in its original state and sold it to canning factories. Some of the fruit he purchased while on the trees (which fruit had been left on the trees by the producers as unfit), some fruit he obtained as culls from packing plants, and the rest he purchased from small operators who delivered the fruit to his place of business.

The Court said, in rejecting the employer's claim of exemption for the tractor-trailer drivers, at 214 F.2d 360:

> Undoubtedly a wider latitude should be accorded to a fruit grower engaged in this type of agriculture, whose employees, in consummation of the operations of producing, hauled the fruit either to bins on farms or to the market for sale. See Chester C. Fosgate Co. v.U.S., 5 Cir., 125 F.2d 775; Lake Region Packing Ass'n v. U.S., 5 Cir., 146 F.2d 157; N.L.R.B. v. Edinburg Citrus Ass'n, 5 Cir., 147 F.2d 353; and N.L.R.B. v. John W. Campbell, Inc., 5 Cir., 159 F.2d 184.

But here, said the Court, at 363:

> The work of gathering the fruit and loading it into trailers at the groves in the present case was done, of course, on the farm, as an essential part of producing for the market, and clearly fell within the express terms of the Act; but the hauling from the farm by appellant who was not a farmer or producer in agriculture, as required by the law, cannot be said to be work "performed by a farmer or on a farm***" under the above quoted definition of agriculture.

The quoted definition referred to is from the *Farmers Reservoir* case, *supra,* 337 U.S. 755, at 762-764.

The fact-situation in *Chapman* is clearly different from that in this case. Olaa is a farmer and as to its own fields the cutting, loading and hauling of cane from its fields to the mill appears to be indisputably a continuous and integrated harvesting operation. As to the planters' fields, the cane trucks enter into and upon these fields, via private field roads, are there loaded, and then leave by said roads. If the truck drivers are participants in "harvesting" while on the field roads, to that extent at least they are exempt under the "primary branch," whether the field is that of Olaa or a planter. Certainly while in the fields of planters they are "on a farm" and the nature of their entire hauls from field to mill place them within the "second branch." As far as hauling from the fields of Olaa to the mill is concerned, it is submitted the truck drivers are "harvesting," or at the very least, as already noted, are engaged in performing practices "by a farmer . . . as an incident to or in conjunction with such farming operations . . ."

Petitioner in seeking to show Banez is not exempt under the provisions of the "second branch" contends that driving on public highways is not work "on a farm" and that since approximately 60% of his driving time was spent on public highways (in addition to the time spent at the mill) the exemption does not apply. (Petr. Br. 27-28) The *Chapman* case, 214 F.2d at 363, is cited in support of this proposition. But in the *Chapman* case, as already noted, the employer was neither a farmer nor a producer in agriculture; he resembled a "dealer or distributor of the product of others." 214 F.2d at 361. Petitioner also cites *Farmers Reservoir,* 337 U.S. at 767. But there, after referring to the legisla-

tive history, the Court was careful to point out that it was clear that the work of the company's employees was done neither on a farm nor by farmers. The function of supplying water to the farms had been divorced by the farmers from the farming operation and set up as a separate and self-contained activity in which the farmers were forbidden to interfere. 337 U.S. at 768.

The difficulty petitioner has on this point stems from its insistence on viewing the truck drivers' activities here as incidental to milling rather than to farming. If hauling Olaa's own freshly cut cane from the fields to the mill for first processing is included in "farming in all its branches" and is an integral part of "harvesting"; and if as to the independent planters' cane the hauling of the same is intimately bound up with the harvesting of the cane "on a farm" and as such is a "practice . . . performed . . . on a farm as an incident to or in conjunction with such farming operations," then Banez is an agricultural laborer. In this connection it is respectfully submitted that in the phrase "as an incident to or in conjunction with such farming operations," "such farming operations" refers to "farming in all its branches" appearing in the first portion of Section 3 (f).

Respondent union takes issue with the Board's finding that the trucking operation is carried on as an incident to, or in conjunction with, its plant operations, rather than its farming operations. (Petr. Br. 29) The record indicates to the contrary and Olaa's operation is in line with "the function performed" test of the *Waialua* case. (See e.g. R. 155-158, the Harvesting Superintendent's description of *harvesting,* which concludes with the truck being unloaded by a crane at the mill.) The Board noted (R. 81) the Com-

pany's transportation system is considered by the Company as a part of its harvesting department. In this connection see Company's Exhibit 4, its table of organization which shows "Cane Transportation" as a function coterminous with "Hand Harvesting" and "Mechanical Harvesting," and all three under the jurisdiction of the Harvesting Superintendent who in turn is a subordinate of the Field Superintendent. However, the Board notes that the Truck Dispatcher supervises the work of the drivers from the plant which therefore became another indication to the Board that Olaa's trucking operation was carried on as an incident to, or in conjunction with, its plant rather than farming operations. (R. 81) But it is clear the Dispatcher was a part of the Harvesting Department and under the supervision of the Harvesting Superintendent; there is certainly no evidence he was a part of or in any way connected organically with the mill crew. His operations (dispatching) were integrated with the loading foreman in the field via radio-telephone (R. 166).

It is submitted that Banez was engaged in harvesting or work incidental thereto or in conjunction therewith and that he was employed on a farm and by a farmer.

### 3. *Board Decisions*

In *Clinton Foods, Inc.,* 108 NLRB 85, the employer was engaged in the growing and processing of citrus products. The employer had three types of truck drivers in its employ: "goat drivers" who carried fruit from the groves to the roadside in vehicles known as "goats"; "semi-drivers" who hauled the fruit in semi-trailers from the roadside to the processing plant; and "goat-flat drivers" who operated "goats" or "flats." These last spent about two-thirds of

their time hauling fruit directly from the groves to the plant in "flats." This was done however only when operations were within a radius of two or three miles from the plant; at greater distances the flat drivers only carried fruit from the groves to the roadside. They spent one-third of their time at this latter operation—which the Board held was clearly agricultural. With respect to the flat-drivers' hauling from the groves to the plant, the Board stated said drivers spent a substantial part of their time on the employer's farm property and noted the farming operation was conducted by and for the employer's benefit. In view of these circumstances, especially the fact that the groves were quite near the processing plant, the Board stated: "We are of the opinion that the driving of the flats with fruit from the groves to the plant is directly related to the marketing of such fruit by the grower thereof. Such operation is, therefore, 'a practice performed by a farmer . . . as an incident to or in conjunction with, such farming operations. Because the 'flat drivers' here involved perform only agricultural functions, we find that they are 'agricultural laborers' who are specifically excluded from the Act and must therefore be excluded from the unit."

But the Board found another basis for its conclusion. Having found that these particular drivers spent at least one-third of their time driving their trucks "on the farm" which constituted a completely agricultural function, reference was then made to the situation where employees spent only one-fourth of their time working as guards (a statutorily exempt classification) and had been deemd excluded from coverage although the rest of their time was in an included category. *Walterboro Mfg. Co.,* 106 NLRB No. 241. Reference was also made to the situation where

an employee spent a part of his time as a supervisor (also statutorily exempt), the rest of his time in covered employment, and was therefore likewise excluded from coverage under the Act. *Hampton Roads Broadcasting Corp.*, 100 NLRB 238. The Board concluded its opinion in the *Clinton case* by stating that even assuming *arguendo* that the truck drivers concerned were partly engaged in non-agricultural work, to the extent that they spent a substantial part of their time in an agricultural function, they must be deemed agricultural laborers within the meaning of the Act and therefore must be excluded. To the extent they were inconsistent, past Board cases holding that truck drivers dividing their time between agricultural and non-agricultural employment were deemed to be within the appropriate unit, were overruled.

The *Clinton* decision was followed in *Hershey Estates,* 112 NLRB 1300, where employees dividing their time between agricultural and non-agricultural duties, spending a substantial part of their time in agricultural duties, were excluded under the agricultural exemption.

In *Yamada Transfer,* 115 NLRB No. 210 (1956), the employer was engaged in hauling general freight; selling and delivering rock; and renting heavy equipment, such as bulldozers, tractors and dump trucks in and around Hilo, Hawaii. Different classifications of employees were involved and the employer, Yamada Transfer, contended that some of them were exempt under Section 2 (3) of the National Labor Relations Act, as amended. With respect to these employees the Board held as follows:

> *Bulldozer-Tractor Operators:* The Employer employs 13 bulldozer-tractor operators. These employees operate bulldozers and tractors which have been

leased to the Olaa Sugar Company and to various independent sugar plantation owners. Their function is to reshape cane land, clear virgin land, plow, harrow, cut lines and cover seeds. The work is performed on plantation lands 8 to 20 miles from the company's offices. The equipment is furnished to the plantation owners by the Employer as needed on an hourly basis. These employees are supervised by the Employer's tractor supervisor and are not interchanged with any other workers.

It is apparent that the bulldozer-tractor operators are performing labors within the meaning of Section 3 (f) of the Fair Labor Standards Act. The Employer testified that the work being performed by the bulldozer-tractor operators on the plantations would be completed within 2 or 3 months after the hearing and that there will then be no further need for this service. As the hearing was held on February 15, 1956, it is possible that all or some of the bulldozer-tractor operators are no longer performing the work which we have found constitutes them agricultural laborers. Accordingly, we shall exclude from the unit as agricultural laborers only those bulldozer-tractor operators who, on the eligibility date, are performing agricultural labor.

*Dump Truck Operators:* The Company employs 12 dump truck operators. At the time of the hearing, three drivers were operating dump trucks leased to plantation owners. The other 9 were engaged in hauling rocks from the Employer's quarry to various sugar plantations, which the plantations use for road building purposes, and to a few private parties. The rocks are unloaded either at the job site or at stockpiles on the plantations. The drivers in this latter group are supervised by the Employer's tractor superintendent.

The drivers working under the lease arrangement carry waste materials to the plantation dumps and haul gravel for the road builders. Although they are immediately supervised by plantation agents, the sole authority to hire, fire, and discipline remains vested in the primary employer. The two groups of drivers are interchanged freely. None of the drivers does any of the actual loading or unloading of the trucks.

In determining whether a particular type of work is agricultural, the Board has said that, "the ultimate test is whether the services of the employees involved are in connection with a mercantile enterprise or an agricultural operation." The Employer herein is engaged in work of a commercial character. Consequently the dump truck drivers' work that relates to the Employer's commercial activities, delivering rocks to the plantations from the Employer's rock pit, is not primarily agricultural or incidental to agricultural operations, and insofar as this work is concerned these employees are not agricultural laborers.

However, while working under the lease arrangement they are at all times employed within the plantation boundaries. The work so performed appears necessary to the proper functioning and maintenance of the plantations. The drivers are directed by plantation foreman and the job they perform is duplicated by plantation employees. We find that the dump truck drivers while working for plantation owners on a rental basis are performing agricultural work.

The Employer alleges that 25 percent of its dump truck work is leased out. At one time or another, all of the dump truck drivers work on the rental basis. However, there is no evidence to show the proportion of time spent by each driver on the rental operations.

In *Clinton Foods, Inc.*, the Board decided that individuals who divide their time between agricultural and nonagricultural pursuits must be deemed agricultural employees. In the instant situation, one-quarter of the dump truck drivers' total operations are performed while working for plantation owners on plantation land. Accordingly, we shall exclude the dump truck drivers from the unit.

*Shovel Operators:* There are two employees in this category. One works at the various plantation stockpiles and the other is stationed at the Employer's rock pit. They are not interchanged. The stockpiles are necessitated by the fact that some of the trucks, hauling rocks to the plantations, are too large to take into the muddy plantation fields. The plantation shovel operator loads smaller field trucks from these stockpiles. This employee spends approximately 5 to 10 hours a week performing repair work at the company garage. Both of these employees work under the same supervision as the dump truck drivers. There is no evidence that these employees load plantation owned trucks or Employer's trucks leased to the plantations.

It is clear that the shovel operators' duties are inseparably connected with the delivery of the Employer's rocks and not with the operation of the plantations. We find that they are not agricultural employees and we shall include them in the unit.

It is interesting to note that at least one of the plantations involved was Olaa Sugar Company, and that this decision was subsequent to the Board's decision in the instant case.

Petitioner denies that the drivers in the instant case can be compared to the "flat drivers" in *Clinton* on a variety of grounds (Petr. Br. 33). First it is contended that since

drivers such as Banez haul came from the *roadside* to the plant, they are more like the semi-drivers in *Clinton*. This ignores the situation in this case where the private roads are within the cane fields and form a network so that the trucks can go into the fields to be loaded. In a very real sense the case here is analagous to trucks going into fruit groves for loading and actual functions rather than semantics should be controlling. In any event it cannot be denied that the private field roads are located upon and within a farm. Next, says petitioner, even if the cane truck drivers here are more nearly like the *Clinton* flat drivers the distance in miles from the plant is much greater in the former than the latter (Petr. Br. 33). No distinction in either the NLRA or the FLSA was made between large and small farms. See the *Waialua* case, *supra,* 349 U.S. 254, 261; *NLRB v. John W. Campbell, Inc.,* 159 Fed 184, 187 (C.A. 5). But even so, it is apparent that much of the hauling is from within a few miles of the mill.

Furthermore, says petitioner, the flat drivers in *Clinton* hauled fruit "from the groves" and thus spent some of their time "in the actual growing area" (Petr. Br. 33). In contrast, petitioner argues, the cane truck drivers here perform no work in the fields; they park the trucks on the roadside. Again the fundamental misconception of the nature, character and function of the private network of dirt roads through the fields, placed there for the express purpose of facilitating harvesting, is evident. Finally, petitioner points out that the cane truck drivers spend about half their time hauling cane of independent planters, and thus the entire trucking operation, as in the *Calaf* case, *supra,* is an incident to milling rather than farming. But if the *Clinton* case has any vitality it is then still apparent that a substantial por-

tion of the cane truck drivers' time is spent on or in the farmlands of either Olaa or those of the planters, and to that extent require an application to them of the exemption.

CONCLUSION

It is respectfully submitted that for the reasons stated respondent union committed no unfair labor practices and that in any event the National Labor Relations Board was without jurisdiction herein by reason of the exempt status of the charging employee. Accordingly the petition for enforcement of the Board's order should be dismissed.

Dated at Honolulu, Hawaii
this 3rd day of December, 1956

Respectfully submitted,

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